35. In the first instance, McEwing's testimony deserves to be believed because it has remained consistent over the last three and one half years. The record shows that immediately following his conversation with Mr. Westbrook McEwing called Mr. Savoie (fdgs. ¶ 10). During that conversation Savoie specifically asked McEwing if Family had permission to specify the site and McEwing told Savoie that he (McEwing) asked Westbrook if he could use the site and Westbrook expressed no objection but requested a written proposal to take to his board. Significantly, that conversation took place only moments after McEwing's conversation with Westbrook and while the conversation was presumably still fresh in his mind. McEwing had little or no opportunity to fabricate details about the conversation or have his recollections tainted by self interest, nor had sufficient time elapsed for the memory of the conversation to become confused or unclear. Moreover, McEwing made the call to Savoie with the understanding that Savoie would probably have to call someone from WANC for technical details about the application, and that any misrepresentation concerning the availability of the site would likely be immediately discovered by Savoie when the WANC representative were called. If McEwing's version of the conversation were untrue, the timing of his call to Mr. Savoie would have required McEwing to immediately fabricate essential details of his conversation with Mr. Westbrook. The record is bare of anything which suggests that McEwing is capable of such deception.

36. Moreover, McEwing reiterated his version of the conversation with Mr. Westbrook following receipt of Westbrook's November 14, 1991 letter in which Mr. Westbrook denied that he had given Family permission to specify the Mt. Defiance site. In his letter replying to Westbrook, McEwing alluded to the fact that he had told Westbrook that "if you have no objections" Family would be specifying the site (fdgs. ¶ 18).

37. Immediately following receipt of the letter from Mr. Westbrook, McEwing called another consulting engineer, Peter Morton, and told him that Westbrook had originally indicated that he had no objections to Family specifying the Mt. Defiance site and then "pulled the rug out form under us" (fdgs. ¶ 20). Very soon thereafter McEwing also called Gary Savoie to determine if Savoie had had any indications that the site was not available, and told Savoie that Westbrook had changed his mind since McEwing had first called him (fdgs. ¶ 26). McEwing gave what was essentially the fifth description of the telephone conversation with Mr. Westbrook in his June 1, 1993 Verified Statement submitted to the Commission, which agreed with his hearing testimony.

38. All of Mr. McEwing's accounts of the conversation, from his essentially contemporaneous description of the conversation to his hearing testimony, were consistent and believable.

39. Surprisingly, Mr. Westbrook's own submissions support at least one essential element of Mr. McEwing's description of their telephone conversation. McEwing testified that he

explained to Mr. Westbrook that Family needed "reasonable assurance" of the availability of the site, and that he had described to Mr. Westbrook what "reasonable assurance" meant (fdgs. ¶ 8). Significantly, both of Westbrook's submissions to the Commission prominently mention the term "reasonable assurance" (fdgs. ¶¶ 16, 17). "Reasonable assurance" is a term of art used with respect to FCC applications, and there is no evidence that Mr. Westbrook consulted with communications counsel concerning his matter, neither his official nor any blind copies of his submissions were forwarded to a communications counsel (fdgs. ¶¶ 16, 17). These facts create a strong inference that McEwing did, in fact, describe "reasonable assurance" to Mr. Westbrook during their conversation, and that the phrase stuck in Westbrook's mind. This fact raises another issue: how likely is it that McEwing would carefully explain what "reasonable assurance" meant, in terms that the site owner remembered, and then misinterpret or misrepresent receiving "reasonable assurance" in a conversation immediately following to his own consulting engineer.

40. McEwing's contemporaneous reactions to Mr. Westbrook's November 14, 1991 letter were both consistent and unfeigned. McEwing had a conversation with Peter Morton <u>immediately</u> following his receipt of Mr. Westbrook's letter (fdgs. ¶ 20). Morton described McEwing's reaction as angry (fdgs. ¶ 20), so did Savoie (fdgs. ¶ 26). Mr. McEwing's natural reaction to Westbrook's letter--surprise and anger--were more consistent with

his innocence than with Mr. McEwing concocting Mr. Westbrook's initial acquiescence to Family specifying the site.

41. Other extrinsic facts and circumstances support McEwing's version of the conversation. The first is that Mr. Savoie called an engineer at WANC the day following his conversation with McEwing to discuss technical details about the application (fdgs. ¶ 12). Although Savoie did not remember exactly to whom he spoke, his notes mention Dave Gallety. However, Savoie had a clear recollection that the person with whom he spoke was aware that McEwing had called the day before and mentioned that he had been instructed to be as accommodating as possible (fdgs. ¶ 13). Savoie testified that he had been involved in many conversations with site owners and station engineers concerning the availability of antenna sites, and when he finished the conversation he had no doubt that Family had received permission to use the site. Savoie's testimony establishes that someone in authority expected his call and instructed the technical people at WANC to be as helpful as possible. If, as is probable, the person, to whom Savoie spoke was Dave Gallety, the unavoidable inference, since Gallety had identified Mr. Westbrook as the person controlling the site the day before in his conversation with McEwing, was that the person giving him the instruction to be accommodating was none other than Mr. Westbrook himself.

42. Also supporting Mr. McEwing's version of the conversation is the inherent improbability of Mr. Westbrook's

reaction, as well as its contrast to Westbrook's reaction to the same request coming from Mr. Morton. It is common knowledge that broadcast tenants provide tower owners with a source of revenue. Mr. McEwing testified that he told Westbrook that he "would make it worth his while" (fdgs. ¶ 7). Westbrook's purported negative response to this opportunity for significant additional revenue is, at least, puzzling.

43. Westbrook's purported reaction is also puzzling in light of his reaction to essentially the same request from Mr. Morton. Mr. Morton testified that he had not one, but two separate conversations with Mr. Westbrook about precisely the same subject, the availability of the Mt. Defiance site for a Hague application, and that he received "reasonable assurance"--permission to use the Mt. Defiance site--in both conversations (fdgs. ¶¶ 23, 24, 25). Moreover, contrary to Westbrook's emphasis on his Board of Directors in his submissions to the Commission; Morton testified that Westbrook didn't even mention his Board during their first conversation, and during the second conversation Westbrook never mentioned or implied that he had to clear decisions concerning the site with the Board (fdgs. ¶ 24). In fact, in all his conversations with Westbrook, concerning WIPS business as well as concerning the Mt. Defiance site, Westbrook always represented himself as the sole decision maker with respect to the Mt. Defiance site (fdgs. ¶ 25). Morton, following his conversations with Westbrook, had no doubt that he was authorized to specify the Mt. Defiance site.

44. Finally, there are other factors which, when added together, also support McEwing's credibility in describing his conversation with Mr. Westbrook. McEwing is an experienced broadcaster, with a number of existing stations which would be put at risk (as they have been) if McEwing had misrepresented the availability of the Mt. Defiance site (fdgs. ¶ 5). Moreover, while McEwing felt some urgency, because the allocation was a "first come, first served" allocation (fdgs. ¶ 7), there was no deadline, like a cut-off list, which established an absolute date by which an application must be filed. In addition, while McEwing believed that the Mt. Defiance site was the best available site for the Hague application, it was not the only one--McEwing was investigating another site when he made his call to Mr. Westbrook (fdgs. ¶ 28). Finally, McEwing knew that the Ticonderoga area was a small community where people knew each other. Indeed, Mr. McEwing and Mr. Westbrook had common acquaintances in the area (fdgs. ¶ 27). McEwing noted that in a small community it is highly unlikely that Family could specify the Mt. Defiance site as its antenna site without some one bringing it to Mr. Westbrook's attention (fdgs. ¶ 27)--which was exactly what happened. If McEwing did not have Westbrook's permission to use the site, the small town atmosphere and their mutual acquaintances meant that there was a high likelihood that any misrepresentations concerning the Mt. Defiance site would be brought to the site owner's attention.

45. In short, a review of all the evidence shows that the overwhelming weight of the evidence and the inferences to be drawn from that evidence support Mr. McEwing's version of the contested conversation, and that Family, in fact, had reasonable assurance to specify the Mt. Defiance site when it filed its application. While Mr. Westbrook's unsworn submissions contradict Mr. McEwing, it is useless to speculate about or attempt to explain Mr. Westbrook's actions. There is nothing in the record to support any speculation. What the record does establish is that Mr. McEwing's account is clear, internally consistent, unimpeached at the hearing, and supported by a plethora of extrinsic facts and circumstances, including Mr. Savoie's testimony that the person with whom he spoke at WANC told him that he had been instructed to be as accommodating as possible. In addition, Peter Morton's testimony shows that Mr. Westbrook had not once, but twice given Morton permission to specify the Mt. Defiance site for exactly the same FM allocation. Accordingly, Mr. McEwing's account deserves to be credited and Family held to have had reasonable assurance of the availability of the Mt. Defiance site when it filed its application for channel 229A, Hague, New York.

B. **There is No Credible Evidence That Family Intentionally Misrepresented the Availability of the Mt. Defiance Site**

46. As argued above, the weight of the evidence clearly supports a finding that Alex McEwing, and Family, had permission --reasonable assurance--to specify the Mt. Defiance site when

Family filed its Hague application. A finding that Family had reasonable assurance of the availability of the Mt. Defiance site eliminates any need to make any finding concerning whether Family misrepresented the putative availability of its specified site.

47. Even if Family is not credited with having received reasonable assurance to specify the Mt. Defiance site, a conclusion which ignores the weight of the evidence, the only other reasonable explanation for the conflict between Mr. McEwing and Mr. Westbrook that has any support in the record is the possibility that the two men simply misunderstood one another. Even if there was no meeting of the minds concerning the Mt. Defiance site as the result of a misunderstanding between the parties, Family would not be guilty of misrepresenting facts to the Commission. Misrepresentation involves an element of intentional misrepresentation that is totally lacking from Mr. McEwing's conduct.

48. Whether providing the Commission with less than fully accurate information is disqualifying depends on whether a willful intent to deceive is found. Fox Broadcasting, Inc., 93 F.C.C.2d 127, 53 Rad. Reg. 2d (P&F) 44 (1983). Inaccurate information, when it results from carelessness or exaggeration but not *scienter*, lacks the element of the deceptive intent normally required for disqualification. See, MCI Communications Corp., 3 FCC Rcd 509, 512, 64 Rad. Reg. 2d (P&F) 672 (1988) ("Bare existence of a mistake without indication of deception does not elevate a mistake to an intentional misrepresentation"),

citing Kaye-Smith Enterprises, 71 F.C.C.2d 1402, 1415, 45 Rad. Reg. 2d (P&F) 983 (1979). The record here is replete with evidence that exonerates Alex McEwing--and Family--of intentional deception. Even if McEwing somehow misunderstood the import of his conversation with Westbrook, it is clear that he honestly believed that he had obtained Mr. Westbrook's permission to specify the site. His belief is attested to by his affirmation to Mr. Savoie, immediately after his conversation with Mr. Westbrook, that Westbrook had not expressed any objections to Family specifying the site, and by his giving Savoie Dave Gallety's number to call if he needed any further information. McEwing's belief that he had received permission to use the site is shown by his starchy reply to Mr. Westbrook's letter, his unfeigned anger and surprise at Westbrook's actions, and his assertions that Westbrook "had changed his mind" or "pulled the rug out from under them" expressed immediately after receiving the letter in telephone calls to both Mr. Morton and Mr. Savoie. At all times, and in all instances, Mr. McEwing's conduct and reactions are consistent only with those of a man with a sincere belief that he had received permission from Mr. Westbrook in the first place. This record is bereft of any evidence of deceptive intent, and, accordingly, cannot support a finding of misrepresentation.

C. **Family's Amendment Should Be Accepted.**

1. Family Had Reasonable Assurance of the Availability of Its Site and the Amendment Otherwise Meets the Erwin O'Connor Test.

49. In deciding whether Family's petition for leave to amend is grantable, and its amendment acceptable, the first issue to be decided is whether Family had reasonable assurance of the availability of the Mt. Defiance site it specified in its application.

> the law is clear that 'an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with ... South Florida Broadcasting Co., 99 F.C.C.2d 840, 845, n. 12 (Rev. Bd. 1984). 62 Broadcasting, Inc., 4 FCC Rcd 1768, 65 Rad. Reg. 2d (P&F) 1829, 1836 (Rev. Bd. 1989), review denied, FCC 90-48 (released February 13, 1990).

See also, Classic Vision, Inc., 104 F.C.C.2d 1271, 1273, 60 Rad. Reg. 2d (P&F) 1681 (Rev. Bd. 1986), review denied 2 FCC Rcd 2375 (1987). As stated in Port Huron Family Radio, Inc, 4 FCC Rcd 2532, 66 Rad. Reg. 2d (P&F) 545, 549 (Rev. Bd. 1989), review granted, modified on another point, 5 FCC Rcd 4562 (1990), "[a]n applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site when it files its application."

50. As noted above, the weight of the record evidence establishes that Family did have the site owner's permission--just like the station manager in National Innovative Programming Network--an agent for the site owner was asked and expressed no objection to the applicant specifying the Mt. Defiance site. Accordingly, the acceptability of Family's amendment depends on

whether the amendment otherwise satisfies the Erwin O'Connor test for the acceptability of post-designation amendments. The Erwin O'Connor six prong test includes the following: "the applicant must have acted with due diligence; the amendment is not required by its voluntary act; no additional issues or parties would be required; the hearing process would not be disrupted; there will be no prejudice to competing applicants; and, ... the applicant will not gain a comparative advantage. Erwin O'Connor, 22 F.C.C.2d 140. 143, 18 Rad. Reg. 2d (P&F) 820 (Rev. Bd. 1970). In addition to the usual "good cause" requirement, engineering amendments must be required by "events the applicant could not have reasonably foreseen." California Broadcasting Corp., 90 F.C.C.2d 800, 808, 51 Rad. Reg. 2d (P&F) 1539 (1982). In this instance, Family meets each and every criteria of the test.

51. Family obviously acted with due diligence in filing its amendment. The proffered amendment is identical to the amendment filed in January, 1992, only two months after Family discovered that its specified site was no longer available to it, and only four months after the initial application was filed. The Hearing Designation Order rejected the amendment not because good cause for the amendment was lacking, but only because the applicant, through mistake (the amendment was filed within a month after Family's application was "accepted for filing"), had not submitted a showing of good cause. Family has acted with due diligence in filing the amendment after designation for hearing, because the amendment may not, as noted above, be accepted until

the Presiding Officer makes findings with respect to the availability of Family's originally specified antenna site. In this instance Family actually filed the amendment prematurely (see Tr. 12)--before the findings on the contested issue--so as to disrupt the hearing process as little as possible.

52. Family also satisfies the other elements of the Erwin O'Connor test. The loss of its specified antenna site, and the site which Family recognized was the best available (fdgs. ¶ 28), was certainly not a product of Family's voluntary act, nor will the amendment disrupt the hearing process. Acceptance of the amendment will not add either parties or issues to the hearing. No party will be discomfited or prejudiced by the acceptance of the amendment, nor will Family garner a comparative advantage, because there are no competing applicants. Loss of its site was not a foreseeable event within the meaning of Section 73.3522(b) of the Commission's Rules. Family more than complies with the acceptability standards for post-designation amendments, particularly in view of the fact that the Erwin O'Connor test is more strictly applied when there are a number of mutually exclusive applicants. Imagists, Inc., 8 FCC Rcd 2763, 72 Rad. Reg. 2d (P&F) 632, 633 (1993).

> The primary purpose of section 73.3522(b) is to prevent undue disruption of the Commission's administrative process. Gross Broadcasting Co., 46 RR 2d 1091, 1097-98, para. 38 (1979). Accordingly, the O'Connor test for good cause is not rigidly applied but interpreted with this overriding objective in mind. Where a post-designation amendment permits the immediate grant of a pending application...by curing a defect in the only pending application, the Commission

> generally concludes that the equities favor accepting the amendment. Las Americas Communications, Inc., 5 FCC Rcd 1634, 67 Rad. Reg. 2d (P&F) 801, 806 (1990)

Family is the only applicant, and acceptance of the amendment will result in the grant of its application. Both Erwin O'Connor and the equities of this case support acceptance of Family's amendment.

2. Under the Particular Facts of This Case, Family's Should Be Accepted Regardless of It Had Reasonable Assurance of Its Specified Site.

53. Given McEwing's transparent good faith, whether Family had or had not reasonable assurance of its site when it filed its application is not, alone, determinative of whether its proferred amendment should be accepted. Indeed, the record shows that, in all circumstances, McEwing had a firm and reasonable belief that Family had permission to use the site when it filed its application. McEwing's, and Family's, obvious good faith distinguishes it from those cases where the Commission held that an applicant could not amend to a new site where it did not have "reasonable assurance" of its originally specified site, all of which involved misrepresentation, fraud or some other fault on the part of the applicant. Without some fault on part of the applicant--some indicia of bad faith--neither the equities of the case or the public interest in the initiation of broadcast service support such a harsh result visited on an innocent applicant.

54. "Good faith," or the lack thereof, is the decisional factor in the cases in which the Commission did not permit the applicant to amend to a new site lacking "reasonable assurance" of its first. For example, in Port Huron Family Radio, Inc., supra, 66 Rad. Reg. 2d (P&F) at 549, the Commission emphasized that: "...an applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site when it files its application." (emphasis added) In every case where the Commission did not permit the subsequent amendment of the application, the lack of an applicant's reasonable assurance was the result of some fault of the applicant--either callous carelessness or calculated deception. In 62 Broadcasting, Inc., supra, the applicant falsely certified that it had the tower owner's permission to specify the site. In South Florida Broadcasting Co., 99 FCC 2d 840, 57 Rad. Reg. 2d (P&F) 495 (Rev. Bd. 1984), and Madelene Gunden Partnership, 2 FCC Rcd 5513, 63 Rad. Reg. 2d (P&F) 1647 (Rev. Bd. 1987), review denied, 3 FCC Rcd 7186 (1988), the applicant had not even contacted the site owner or the site owner's agent when it certified that it had "reasonable assurance" to specify the site. In Port Huron Family Radio, Inc., supra, the applicant based its putative right to use the site on seeing a "for sale" sign on the property, and never contacted the site owner. In addition, the applicant's testimony on the matter was found to be less than believable. In Cannon Communications Corp., 5 FCC Rcd 2695, 67 Rad. Reg. 2d (P&F) 1159 (Rev. Bd. 1990), the applicant was not allowed to amend to a new

site because it misrepresented the availability of its initially specified site. In Progressive Radio, Inc., 103 FCC 2d 429, 59 Rad. Reg. 2d (P&F) 1173 (Rev. Bd. 1986), the applicant submitted a false declaration concerning site availability. In Classic Vision, Inc., supra, the Commission dismissed an application because the applicant conceded that it had no understanding with the site owner.

55. In no case which counsel has reviewed was an applicant denied the right to amend its application where the applicant essentially had "clean hands"--i.e., was essentially an innocent victim of mistake or misunderstanding.

56. Because of McEwing's, and Family's, essentially innocent conduct, this case is more analogous too, and is governed by, those cases where the Commission permitted an applicant to amend to a new site where the applicant's purported lack of reasonable assurance of the site specified was the result of property misidentified or coordinates miscalculated through mistake or inadvertence. For example, in Harrison Broadcasting Co., 6 FCC Rcd 5819, 70 Rad. Reg 2d (P&F) 40 (Rev. Bd. 1991), review denied, FCC 92-204 (released May 12, 1992), the applicant was permitted to amend its application to specify correct site coordinates, even though the original coordinates did not locate the site on land whose owner had granted permission for the filing of the application, and who, when the issue was raised, sought and received permission from an adjoining land owner on whose land the site was also not located. The Commission held

that even though the applicant had specified the wrong coordinates, no one "had shown that the applicant did not earnestly believe" that he had reasonable assurance to use the site. Harrison Broadcasting Co., supra, 70 Rad. Reg. 2d (P&F) at 48. Accordingly, it was the subjective good faith intent of the applicant which was decisionally significant, rather than the objective determination of whether the applicant objectively possessed reasonable assurance of the site specified in its initial application.

57. Similarly, in Brownfield Broadcasting Corp., 93 F.C.C. 2d 1197, 53 Rad. Reg. 2d (P&F) 1175 (Rev. Bd. 1983), review denied 84-11 (released January 17, 1984), the Commission permitted an applicant to amend to specify new site coordinates, even after the Commission had added a site availability issue, because the applicant had made a mistake in locating its site and always meant to specify the correct site. Accord, Family Broadcasting, Inc., 93 FCC 2d 771, 53 Rad. Reg. 2d (P&F) 662 (Rev. Bd. 1983), review denied FCC 83-559 (released November 29, 1983) (applicant with no reasonable assurance of site specified in application because of mistake in coordinates permitted to amend after a site availability issue was added because the applicant believed, in good faith, that the site was available). In another instance where an applicant was permitted to amend because the delay or deficiency was the result of a mistake was Tucson Community Broadcasting, Inc., 4 FCC Rcd 6316, 66 Rad. Reg. 2d (P&F) 1689 (1989), where the Commission permitted an applicant

to amend to a new site long after the hearing because the applicant had made a good faith mistake that the existing site owner had obtained FAA approval for the tower when that was not the case.

58. McEwing's honest and good faith belief that he had the site owner's permission--reasonable assurance--to use the Mt. Defiance site, distinguishes this case from cases where the applicant's bad faith or misconduct required the denial of the applicant's request to amend. As noted above, the Commission has always concerned itself with the equities involved, and permitted innocent applicants acting in good faith to amend their applications, even post-designation, where the applicant did not have objective reasonable assurance of the originally specified site because of a mistake. The record shows that Mr. McEwing, and Family, have always proceeded in good faith and with a fixed determination to initiate the first local transmission service to the residents of Hague, New York.[3]/ Family submits that regardless of whether it possessed, in objective fact, reasonable assurance of the availability of the Mt. Defiance site, that the equities of the case, its good faith and innocent intent, and the public interest in the prompt initiation of the first local transmission service to Hague, New York, strongly supports the acceptance of Family's proffered amendment and the grant of its

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[3]/ The Presiding Officer may take judicial notice of the fact that no operating radio station is licensed to Hague, New York, nor have any construction permits been granted for an authorization to serve Hague, New York.

application. As the Commission stated in Imagists, Inc., supra, 72 Rad. Reg. 2d at 634-35, the "...agency has a public interest obligation to provide new service to the public as expeditiously as possible."

IV. ULTIMATE CONCLUSION

59. Family submits that the weight of the record evidence compels the following findings and conclusions: that Family had reasonable assurance to specify the Mt. Defiance site when it filed its original application; that it did not misrepresent the availability of the site in its application; that it acted at all times with an honest and innocent belief that it had the site owner's permission to specify the site until it received written evidence to the contrary; and, that its proffered amendment specifying a new site is supported by good cause and the equities of the case and should accepted. In accordance with these findings and conclusions, Family's pending application for channel 229A, Hague, New York, should be granted.

Respectfully Submitted,

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January 31, 1995

CERTIFICATE OF SERVICE

I, Brian R. Claydon, a legal assistant in the Law offices of Joseph E. Dunne III, hereby certify that I have caused to be hand delivered this 31st day of January 1995, a copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to the following:

The Honorable John M. Frysiak
Administrative Law Judge
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By: 
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